

**FSA RESPONSE TO THE MACRORY REVIEW – REGULATORY JUSTICE:  
SANCTIONING IN A POST-HAMPTON WORLD****Executive Summary**

1. In September 2005 Professor Macrory was asked by the then Chancellor of the Duchy of Lancaster, John Hutton, to carry out a review of the existing system of regulatory sanctions to ensure that they were consistent and appropriate for the risk based approach to regulation and enforcement as set out in the Hampton Review.
2. At the end of May this year Professor Macrory published a consultation document on his initial findings and proposals for what he sees as a modernised system of regulatory sanctions. He has asked for responses by 18 August. This paper sets out Macrory's proposals for the Board, with the Executive's initial assessment of these. It is proposed that a full response will be produced, taking on board issues raised by the Board. This will then be circulated to all Board Members for further comment before it is sent to Professor Macrory in time to meet his deadline of 18 August.
3. To Board is invited to:
  - **agree** that the Food Standards Agency should reply formally to the Macrory Review consultation document;
  - **provide** a steer on how the FSA should respond, to inform the drafting of a reply by the Executive for subsequent comment by the Board in correspondence and;
  - **agree** that the FSA response should be published.

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**FSA RESPONSE TO THE MACRORY REVIEW – REGULATORY JUSTICE:  
SANCTIONING IN A POST-HAMPTON WORLD****Issue**

1. To decide whether and in what terms the FSA should reply to Professor Macrory's proposals for a modernised system of regulatory penalties. The deadline for comments to Professor Macrory is 18 August.

**Strategic Aims**

2. A key aim for the FSA is to protect consumers by improving the safety of food. It is important that we have a regulatory regime that is able to support this aim and a system of sanctions, which can be used against those who breach that regime.
3. In May 2006 Professor Macrory published his interim report setting out the results of his discussions following the commissioning of his review as described in Annex A, and consideration of responses he received to his discussion document. The report, which runs to 106 pages, is available via the Cabinet Office website<sup>3</sup>, but a copy of the Executive Summary is attached at Annex B. The report seeks views on specific questions (see Annex C).

**Discussion**

4. Professor Macrory's remit was to examine whether current regulatory sanctions were consistent and appropriate for the risk-based approach to regulation, and if not to make proposals for reform. Macrory concludes (in chapter 2 of his report) from the evidence he received from all his stakeholders – businesses, trade associations, regulators and Magistrates - that the current penalty system does require some updating. He also recognised that there are some gaps in the basket of enforcement tools available to regulators. He believes the current tools rely too much on criminal sanctions. A total reliance on criminal sanctions does not allow regulators the flexibility in the enforcement process to respond to business needs in order to achieve compliance. For example, business may be wary of approaching regulators for assistance in compliance. Research carried out in 2005 suggested that the current penalties regime similarly does not meet the concerns of consumers. A penalties regime, if well understood and seen to be applied effectively, could and should have a role in building consumer confidence on food and the regulation of food. **Does the Board agree with Professor Macrory's overall conclusions about the current penalty system, and that his proposal for an enhanced penalties toolkit should be welcomed?**

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<sup>3</sup> [http://www.cabinetoffice.gov.uk/regulation/reviewing\\_regulation/penalties/index.asp](http://www.cabinetoffice.gov.uk/regulation/reviewing_regulation/penalties/index.asp)

5. In order to increase the penalty toolkit Macrory makes proposals for:

- administrative penalties;
- statutory notices;
- enforceable undertakings;
- restorative justice.<sup>4</sup>
- criminal prosecutions;
- penalties principles.

#### *Prosecutions*

6. The Board may wish to consider Macrory's comments on prosecutions. Macrory believes their use should be restricted to the most serious breaches. The FSA believes that, in addition to taking action to drive improvement and reward good performance, our food law enforcement partners should seek firm action against those who persistently fail to meet acceptable standards, as well as those who expose the consumer to serious risk. The Board may therefore wish to reply to Professor Macrory that whilst it agrees that the option of prosecution should be available for the most serious breaches of food legislation, persistent law-breaking (which continues despite other interventions being applied, is also a candidate for prosecution). **Does the Board agree?**

#### *Penalties Principles*

7. Macrory proposes that his new penalty regime should be governed by a set of principles (see page 8 of the Executive Summary) which would be linked to the Government's statutory Compliance Code. Aside from the fact that some of the principles may in fact be aims, an issue of greater concern is that the penalties principles apply at the enforcement i.e. individual, level whilst the Compliance Code applies at the policy/regulator level. This mismatch of the two could risk leaving regulators exposed to judicial review and confusion to business.

8. There is also a danger that through adding another set of principles to those which already exist (for example the Principles of Good Regulation; the Hampton Principles) regulators will be confused about which principles they should follow in which circumstances. Others may use this confusion to launch vexatious challenges against the regulators. If Macrory's preference is for a set of principles, the Board may wish to suggest that they should be harmonised within

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<sup>4</sup> Process whereby those most directly affected by a wrongdoing come together to determine what needs to be done to repair the harm and prevent an occurrence.

an existing set of principles. **Does the Board agree with the assessment of the risk relating to the proposed penalties principles?**

#### *Administrative Penalties*

9. Macrory proposes that variable and fixed administrative penalties should be part of the penalties toolkit. Administrative penalties might have a place in dealing with non-serious breaches of food legislation where the breach is clear and demonstrable, for example food beyond its use by date left on a shop shelf or incorrect labelling. Whilst it is likely that fixed rather than variable penalties would better suit such breaches of food law, variable administrative penalties could provide other options where, for example, the penalty could increase for 2<sup>nd</sup> or 3<sup>rd</sup> offences. Also, variable penalties give the option of higher penalties on the principle of the ability of the business to pay. Consideration should be given for daily penalties where the offence relates to an ongoing omission by the business, for example failure to register the business. **Does the Board agree that both fixed and variable administrative penalties should be included in the toolkit for breaches of food law?**

#### *Statutory Notices*

10. Macrory proposes greater use of statutory notices such as enforcement notices and enforceable undertakings. The Food Law already gives the option for a number of types of enforcement notices, however, and there may be some attraction in enforceable undertakings. Enforceable undertakings in effect provide for a contract between the business and enforcement authority that guides the future actions of the business. They could be used where the business is able to demonstrate in word and deed its capacity and appetite to correct any oversight that lead to a regulatory breach. They may be most useful for SMEs who have the desire to comply with the law but do not always have the knowledge or tools. **Does the Board agree that enforceable undertakings should be part of the penalties toolkit?**

#### *Restorative Justice*

11. Macrory proposes that restorative justice<sup>4</sup> (RJ) should have a greater role in the penalties toolkit. Whilst it is difficult to disagree with this, it is unlikely that RJ would be used extensively in the food area. In cases, for example, of food poisoning it is often difficult to establish beyond reasonable doubt the exact cause or source of the poisoning. **Does the Board agree that restorative justice has a place in the penalties toolkit?**

## *Regulatory Appeals Tribunals*

12. Macrory proposes that a Regulatory Appeals Tribunal be established to deal with appeals against administrative penalties. This would ease some of the pressure on the courts, which the Government, is keen to do. It can also be a speedier and cheaper way of resolving disputes, particularly where there may be a continuing professional relationship, but only if the tribunal service is adequately resourced and is not bureaucratic in its process. In the proposals the cost of the new tribunal service would be financed through the Department for Constitutional Affairs (DCA). Any additional costs would be covered through a bid under the spending review process and the direct charging of fees to those using the service. On this basis we would expect the extra costs in running the tribunal service to be cost neutral for the Agency. **Does the Board agree with this assessment of Macrory's tribunal proposals?**

## *Devolution Issues*

13. A key aim of the reform of the penalties regime is that any new regime should be consistent across the UK. The regime does not need to be exactly the same in all countries of the UK (differences already currently exist) providing it is in all cases effective and efficient in delivering the desired outcomes to protect public health. **Does the Board wish to raise any devolution issues with Macrory now?**

## **Conclusion**

14. The Board will recall work that is on-going within the FSA, in line with the Hampton agenda, to further develop its modern and risk-based approach to regulation and enforcement. A key aspect of this could be a modern penalties regime which is able to respond quickly and effectively to breaches of legislation, as well as encourage compliance. The Board may wish to consider whether overall Macrory's proposals will help the FSA deliver greater compliance and provide appropriate tools to deal with those who break the law.

## **Board Action Required**

15. The Board is asked to:

- **agree** that the Food Standards Agency should reply formally to the Macrory Review consultation document;
- **provide** a steer on how the FSA should respond, to inform the drafting of a reply by the Executive for subsequent comment by the Board in correspondence; and
- **agree** that the FSA response should be published.

## BACKGROUND

In September 2005, Professor Richard Macrory, Professor of Environmental law at University College London, was invited by John Hutton, the then Chancellor of the Duchy of Lancaster, to carry out a review of the existing system of regulatory sanctions. Professor Macrory was asked to ensure that current regulatory sanctions were consistent and appropriate for the risk-based approach to regulation set out in the Hampton Review<sup>1</sup>. Philip Hampton had recommended in his final report of March 2005 that the Government establishes a comprehensive review of regulators' penalty regimes. Professor Macrory published a discussion paper Regulatory Justice: Sanctioning in a Post-Hampton World<sup>2</sup> in December 2005. This document invited views on how the regulatory sanctions and penalties could be reformed and improved. In its response the FSA made a number of points, including that:

- penalties for a regulatory breach should be aligned, with both the potential impact on public health and the ability of the food business to pay;
- consideration should be given to introducing administrative penalties and a system of binding arbitration between the alleged wrongdoer and the local authority enforcement officers.

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<sup>1</sup> Reducing Administrative Burdens: effective inspection and enforcement, HM Treasury, March 2005. [www.hm-treasury.gov.uk/hampton](http://www.hm-treasury.gov.uk/hampton)

<sup>2</sup> Regulatory Justice: Sanctioning in a post-Hampton World, Better Regulation Executive, December 2005. [www.cabinetoffice.gov.uk/regulation/documents/pdf/penalties.pdf](http://www.cabinetoffice.gov.uk/regulation/documents/pdf/penalties.pdf)

## Executive Summary

In September 2005, I was asked by the Chancellor of the Duchy of Lancaster to examine the system of regulatory sanctions to ensure that these were consistent and appropriate for the risk based approach to regulation set out in the Hampton Review. This consultation document contains my initial findings on the penalties system and outlines my vision for a modernised system of regulatory sanctions, which I invite all stakeholders to consider and comment on. I intend to publish my final recommendations in autumn 2006.

Sanctions are an important part of any regulatory system. They provide a deterrent and can act as a catalyst to ensure that regulations are complied with. A system of effective penalties can signal that behaviour which jeopardises citizens' health and safety, pollutes the environment, violates the rights of consumers or distorts a free and competitive market is not acceptable and will not be tolerated.

Over the past few years, the Government has introduced a series of reforms that have aimed to improve the efficiency of the sanctioning system. Many of the more recently created economic and financial regulators have very modern sanctioning toolkits which include flexible and proportionate responses to address regulatory non-compliance, including monetary administrative penalties (administrative fines). The tribunal system is also looking to undergo a radical overhaul and this work is being led by the Department for Constitutional Affairs (DCA). The Department for Environment Food and Rural Affairs (Defra) is currently consulting on the introduction of administrative sanctions for regulatory non-compliance in the fisheries industry. I recognise the good work done in these areas, and have built on these ideas when setting out my own vision for a modern regulatory penalties system.

The challenge for Government and regulators set out in my review is to build on these initial steps. This will mean a shift in the way regulators approach regulatory sanctioning. A more flexible toolkit will require some additional safeguards for the rights of victims and offenders. It will also mean a lesser reliance on criminal prosecutions as a regulatory sanction with greater reliance on other types of sanctions such as administrative penalties or statutory notices. Modernising the sanctioning toolkits should enable the Hampton vision to be realised more readily with a renewed focus on advice and education and less emphasis on inspections.

My vision for the penalties system is a step change from where we are today. It allows for a flexible and proportionate approach with a broad range of sanctioning options, where regulators can respond to the needs of individual cases and the nature of the underlying offence. It recognises that effective sanctions can also aim to restore the harm caused by regulatory non-compliance and take into consideration the needs of victims, offenders and communities affected by regulatory non-compliance.

The changes needed to realise this vision will not happen overnight. Some will require legislation; others will require a shift of long-established culture and practice in regulators and business. I think, however that both Government and regulators have already taken some initial steps towards a more flexible sanctioning toolkit. I believe the vision set out in this document is achievable and in tune with the latest thinking on regulation in the UK and abroad.

Professor Richard Macrory

## Introduction

1. The final report of the Hampton Review, published in March 2005, recommended that the Government establish a comprehensive review of regulators' penalty regimes.<sup>1</sup> Following this recommendation, the Penalties Review was established under my leadership. As part of this review, I have looked at sanctioning regimes and penalty powers in detail over the last eight months. My work and thinking has been informed by the evidence submitted to me and by the work of Government departments, academics and practitioners. I have also studied the administrative penalties and regulatory sanctions available in other countries, including Australia, Canada and the United States to obtain an understanding of the policy and practice in these leading developed nations.
2. The Hampton Review found that regulatory penalty regimes can be cumbersome and ineffective. Although the Hampton Review envisaged the introduction of tougher and quicker penalties for more serious offences, the principal purpose of my review is not a blanket strengthening of penalty regimes. Rather, I want to consider options that could add to regulators' enforcement toolbox, broadening the flexibility available to both regulators and the judiciary to better meet regulatory objectives and improve compliance. These options would also benefit business, by providing a transparent system with appropriate sanctions that would aim to get firms back into compliance, ensure future compliance, provide a level playing field for business and enable regulators to pursue offenders that flout the law.
3. I published a discussion paper, *Regulatory Justice: Sanctioning in a post-Hampton World* in December 2005 to promote thinking on how regulatory sanctions and penalties could be reformed or improved.<sup>2</sup> It invited anyone with an interest in or experience of regulatory justice to submit evidence to the review team. The discussion paper set out the key issues previously identified in the Hampton Review and identified areas of interest for my review when considering reform, such as the use of criminal prosecutions as a regulatory sanction, administrative penalties, restorative justice, re-categorising or decriminalising regulatory offences and venues for hearing cases and appeals related to regulatory non-compliance. The purpose of the paper was to promote discussion and stimulate thinking around the area of regulatory sanctioning and penalty regimes.
4. It is important that regulators have a sanctioning toolkit that lets them ensure the protection of workers, consumers and the environment. Such a toolkit needs to provide appropriate options to handle the regulatory needs of legitimate business as well as those businesses that intentionally and knowingly fail to comply with regulatory obligations. Evidence submitted to me suggests that many regulators are over-reliant on one tool, namely the criminal prosecution, as it is the main sanction should business or individuals be unwilling or unable to follow advice and comply with legal obligations. This option may not be the most appropriate in all circumstances to ensure that non-compliance is addressed and that any damage caused is remedied or behaviour is changed; the availability of other tools may result in better regulatory outcomes.

<sup>1</sup> *Reducing administrative burdens: Effective inspection and enforcement*, Hampton P., HM Treasury, March 2005, Recommendation 8

<sup>2</sup> *Regulatory Justice: Sanctioning in a post-Hampton World*, Better Regulation Executive, December 2005, <http://www.cabinetoffice.gov.uk/regulation/documents/pdf/penalties.pdf>

5. The reforms I propose are designed to modernise sanctioning toolkits across the regulatory system, reflecting the risk-based approach to regulation and the broader regulatory reform agenda and addressing the needs identified above. In this document, I set out the vision for what this modern, fit-for-purpose sanctioning regime could look like. My aim is not to be prescriptive, but to offer options for Government departments and regulators to consider which will be unique and specific to particular areas but will share common principles, features and characteristics.
6. Many of my suggested recommendations are a continuation of current Government proposals and reforms. For example the Home Office is exploring the role of Restorative Justice in areas such as corporate homicide and youth offending; the Department for Constitutional Affairs (DCA) is looking to undertake a radical overhaul of the tribunal system; and the Department for Environment, Food and Rural Affairs (Defra) is currently consulting on the introduction of administrative penalties in the area of fishing and marine activities.
7. Whilst the UK has a leading position in the area of regulatory reform, little has been done to modernise the sanctioning toolkit in recent times. In this area, we have not kept pace with the innovations being introduced in other leading OECD nations such as Australia and Canada, countries which share some of our legal tradition. Although some work towards this has begun, I believe that the UK must address this area in order to ensure that the Government's better regulation agenda, including the recommendations of the Hampton Review and the Better Regulation Task Force's report "Regulation – Less is More", is realised.<sup>3</sup>

## Policy Proposals

8. I have considered a broad spectrum of sanctioning tools, ranging from influencing methods such as warning letters or the use of informal, pragmatic means like advice and persuasion, to criminal prosecution at the top end of the enforcement pyramid (see annex A). I have also considered the major motivations for non-compliance. My aim is to identify a range of suitable sanctioning options that should be available to allow regulators to deal appropriately with each type of offender, including the 'rogue' element present in all areas of business.
9. The reformed sanctioning system I propose will increase public confidence, give greater awareness to the needs of victims and ensure that business non-compliance is met with a proportionate response. It will do this by providing a transparent system with sanctions that encourage and assist firms to comply with their regulatory obligations.
10. The proposed areas of policy reform I suggest are set out for consultation in chapter seven and summarised in Box E1 below. They include proposals around the following areas:
  - A list of 'Penalties Principles' and a framework for regulatory sanctioning;
  - The role of the criminal prosecution as a regulatory sanction;
  - The role of Monetary Administrative Penalties (administrative fines);

<sup>3</sup> *Regulation – Less is More*, Better Regulation Task Force, March 2005. January 2006 the Better Regulation Task Force became the Better Regulation Commission (BRC).

- Enforcement Notices and other innovations in a similar vein such as Enforceable Undertakings;
- The role of Restorative Justice in regulatory non-compliance; and
- Alternative sentencing options that could be available in criminal courts.

11. The reforms I suggest are not intended to transform sanctioning systems overnight. Rather, they are to bring into them the flexibility, efficiencies and responsiveness that can facilitate the full implementation of the Hampton agenda, resulting in better deterrence options for regulators, better compliance for business and better outcomes for society as a whole.

#### Box E1 Proposed elements for reform of the penalties system

##### ***Criminal Proceedings***

- The use of criminal prosecution should be maintained to sanction serious regulatory non-compliance where there is evidence of intentional or reckless behaviour or where the actual or potential consequences are so serious that public interest demands a criminal prosecution.

##### ***Administrative Penalties***

- There should be greater use of administrative sanctions and I propose three different models for consideration. My preferred model proposes that the regulator has discretion to apply Fixed or Variable Monetary Administrative Penalties (administrative fines) but, if contested, the recipient firm can appeal the matter to an independent administrative tribunal.

##### ***Statutory Notices***

- The use of Enforcement and Improvement Notices should be strengthened by ensuring that regulators have mechanisms in place to follow them up.
- Regulators and firms should be able to agree an Enforceable Undertaking for the firm as an alternative to the imposition of a penalty (such as bringing a prosecution). Enforceable Undertakings could also be combined with a Monetary Administrative Penalty.

##### ***Restorative Justice***

- Restorative Justice could be a useful process to ensure that the needs of victims of regulatory crimes are addressed and proposes two options to consider: I believe both options should become part of the regulatory toolkit.
- Option one – RJ as a pre-court diversion. The regulator could suggest a Restorative Justice process to the firm after gathering all the facts of the case, but before initiating criminal proceedings.
- Option two – RJ in lieu of an administrative fine. The regulator could suggest an RJ process before imposing an administrative fine.
- Option three – RJ as part of criminal proceedings, Magistrates or Crown Court judges could recommend a Restorative Justice process to the firm at various stages of the criminal proceedings such as pre sentencing or as part of a sentence.

**Proposals to increase effectiveness of criminal courts**

- I suggest some proposals for consultation which could increase the effectiveness of sanctioning regulatory non-compliance through criminal proceedings. These include initiatives to develop guidelines for sentencing and to concentrate prosecutions in certain areas to particular courts.
- I also suggest for consultation that, when appropriate, the maximum level of penalties available should be reviewed and that fines handed down by courts should aim to eliminate the financial gain made as a result of the regulatory non-compliance.

**Powers available to the criminal courts**

- I suggest that in addition to the tools that could be made available to regulators, Magistrates and Crown Court judges may also benefit from having an extended toolkit in addressing regulatory offences, which could include options beyond financial penalties or imprisonment. This could include options such as conditional cautions or publicity orders.

12. I have also set out a framework within which these new sanctions would fit. The revised sanctioning tools must adhere to the 'Hampton Principles' and regulators must ensure that they are consistent with a publicly available enforcement policy to ensure transparency, fairness, proportionality and accountability when applying a sanction for regulatory non-compliance. This framework is set out in Box E2 below.

**Box E2 Proposed key principles and framework for applying penalties****The Macrory Penalties Principles**

I have identified the following '**Penalties Principles**' that I believe should be the basis for any sanctioning regime:

1. Sanctions should **change the behaviour** of the offender.
2. Sanctions should ensure that there is **no financial benefit** obtained by non-compliance.
3. Sanctions should be **responsive** and consider what is appropriate for the particular offender and the particular regulatory issue.
4. Sanctions should be **proportionate** to the nature of the offence and harm caused.
5. Sanctions should aim to **restore the harm caused** by regulatory non-compliance.
6. Sanctions should aim to **deter future non-compliance**.

**Framework for applying penalties**

I suggest that, in order for these Penalties Principles to be applied effectively and consistently, regulators should operate within a framework with the following six characteristics:

1. Regulators should **publish an enforcement policy**.
2. Regulators should **measure the outcomes** of their enforcement activities and tailor their enforcement effort to improving these outcomes.
3. Regulators should always be able to **justify the choice of enforcement actions** and explain why these actions are appropriate.
4. Regulators should always **follow up enforcement actions** and ensure that their sanctions are credible to offenders.
5. Regulators should **be transparent in what formal enforcement activity has been taken** in order to safeguard all stakeholders.
6. Regulators should be **transparent in the methodology for calculating administrative penalties**.

## Consultation

13. The proposed solutions set out in this interim report are not final recommendations. Rather, at this stage of the review process, I am seeking views on a number of key options. I am interested in hearing from regulators, business, non-governmental organisations and any other interested parties on all areas discussed in this report.
14. Chapter seven details the questions for consultation and how responses can be submitted to me. The closing date for the consultation period is August 18, 2006. I will publish my final report and recommendations in autumn 2006.

## Chapter seven

### Questions for consultation

#### This chapter sets out the questions for consultation

- 7.1 This document sets out suggestions for potential reforms in the area of for regulatory sanctions. These areas are covered in more detail in chapters three through to seven. The review would welcome views from all stakeholders on any of the issues raised in the report. A list of questions for consultation is outlined in this chapter. Respondents should not feel bound by the list of questions – any response on any issue would be welcomed.
- 7.2 Consultation responses should be sent, by Friday, 18th August 2006, to:
- Macrory Penalties Review  
Cabinet Office – Better Regulation Executive  
Kirkland House  
22 Whitehall  
London SW1A 2WH
- 7.3 The final report is expected to be published in Autumn 2006. Consultation responses received after the August deadline, may not be considered.
- 7.4 All information in responses, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004). If you want your response to remain confidential, you should explain why confidentiality is necessary and your request will be acceded to only if it is appropriate in all the circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department. Contributions made to the review will be anonymised if they are quoted.
- 7.5 The review would like to hear from you on the following subjects:

#### My Vision for Contemporary Sanctioning Regimes

1. Do you agree that criminal prosecution and the criminal courts should be reserved for the truly egregious offenders or where regulatory breach leads to severe actual or potential external consequences?
2. Do you agree with the vision that is laid out in Figure 1.3 of a contemporary regulatory enforcement toolkit?
3. Do you agree or disagree with the 'Penalties Principles' proposed in chapter one? If you disagree with one or all of the Principles listed below, please elaborate?
  - a. Principle # 1 – Sanctions should **change the behaviour** of the offender to prevent regulatory non-compliance.
  - b. Principle # 2 – Sanctions should **eliminate any financial benefit** or benefit which was the result of regulatory non-compliance.

- c. Principle # 3 – Sanctions should be **responsive and take into account what is appropriate for the particular offender and the particular regulatory issue.**
  - d. Principle # 4 – Sanctions should be **proportionate** to the nature of the offence and the harm caused
  - e. Principle # 5 – Sanctions should include an element of ensuring that the **harm caused by regulatory non-compliance is put right.**
  - f. Principle # 6 – Sanctions should aim to **deter future non-compliance.**
4. Are there any principles that should be added to this list? If yes, please provide details including supporting comments and evidence.
  5. Do you agree that a regulator must ensure the following characteristics to be present in order for a sanctioning regime to be most effective?
    - a. The regulator should have a published enforcement policy
    - b. The regulator should attempt to measure regulatory outcomes (such as compliance rates) and as well as outputs (such as the number of enforcement actions taken).
    - c. The regulator should be able to justify the enforcement actions they take
    - d. The regulator should follow up enforcement actions
    - e. The regulator should be transparent in the enforcement actions it takes
    - f. The regulator should be transparent in the methodology it uses for setting and calculating monetary administrative penalties.
  6. How should regulators be required to report their performance and progress against their enforcement strategies?
  7. Should regulators make a more focused effort to communicate their strategy for targeting businesses that are deliberately non-compliant? If yes, how should they approach this?
  8. What can be done to capture the rogue elements within industries?
  9. Is there need for increased investigative powers to be afforded to regulators to better deal with rogue businesses?
  10. Should due diligence defences be included in all areas of criminal offences involving regulatory breach?
  11. Would more training be appropriate for judges in the area of regulatory non-compliance and appropriate sentencing?
  12. Should sentencing guidance be prepared for areas of regulatory non-compliance?
  13. Should the fine maxima in criminal courts be abolished? Should a cap be set?
  14. Should the cap follow the principles laid out in the Competition Act 1998 which provides that administrative penalties may not exceed ten percent of the relevant turnover of the undertaking concerned?

15. Should profits gained from non-compliance be subject to a separate profits order which is intended to remove any economic gains from non-compliance as well as a separate fine element?

### **Monetary Administrative Penalties (MAPs)**

16. In general, do you agree that regulators should have Monetary Administrative Penalties available to them as an additional sanction option in their enforcement toolkits? If no, then please elaborate on your views.
17. Do you prefer Model # 1 (paragraphs 3.40 – 3.44), Model # 2 (paragraphs 3.45 – 3.47) or Model # 3 (paragraphs 3.48 – 3.51). Please explain why you would prefer one particular model?
18. Should regulators have FMAPs available to them? For what types of offences (either in general or giving specific examples) would they be appropriate? What level of financial penalty would be appropriate for FMAPs?
19. Should regulators have VMAPs available to them? For what types of offences (either in general or giving specific examples) would they be appropriate?
20. Should the level of VMAPs be determined with regard to one or more of the following aggravating or mitigating factors:
  - Financial gain made by the offender
  - Offender's past record of compliance
  - Annual turnover of the offender
  - The co-operation of the offender
  - The timely and accurate reporting of the issue
  - Timeliness of corrective action
  - Please provide other relevant factors which you feel should be included.
21. Should the level of VMAP be unlimited?
22. Should the maximum level of VMAPs set out in legislation be capped to never exceed ten percent of the relevant annual turnover as per the details of the Competition Act 1998?
23. Should there be provision to supersede the cap if the financial benefit is greater than the capped amount?
24. Should there be an option for settlement as an alternative to a MAP? In what sort of cases should this be considered?

### Enforcement Notices

25. Should regulators follow-up statutory notices such as Enforcement or Improvement Notices on a risk adjusted basis?
26. If a statutory notice is not complied with, should regulators be able to apply a Monetary Administrative Penalty for non-compliance with an Enforcement Notice?
27. If a regulatory appeals tribunal exists, should appeals for statutory notices be heard in this venue?

### Enforceable Undertakings and Undertakings Plus

28. Do you think Enforceable Undertakings are a good alternative sanction to have available to regulators?
29. Does the described model suggest the correct key elements for introducing Enforceable Undertakings in the UK?
30. Should business be able to apply to the regulator to enter an Enforceable Undertaking or should it be solely at the discretion of the regulator to suggest an Enforceable Undertaking?
31. Should Enforceable Undertakings be disclosed publicly? Should regulators follow-up Enforceable Undertakings?
32. Would Enforceable Undertakings in principle be appropriate for all types of offences, or are they more appropriate for particular types of offences (please provide details of types of offence or specific offences)?
33. Should enforceable undertakings be accompanied by a Monetary Administrative Penalty in order to effectively sanction serious offences?
34. What sort of conditions on a business should an Enforceable Undertakings seek to impose.

### Restorative Justice

35. Do you agree that Restorative Justice is something that can be applied to the area of regulatory non-compliance? Please elaborate on your views.
36. For what types of offences would it be appropriate?
37. Do you agree with Option #1 (paragraphs 5.27 – 5.29) of RJ as a pre-court diversion? If you disagree, please elaborate on your views.
38. In what cases or for what offences would the use of RJ as a pre-court diversion be appropriate?
39. Should RJ be an alternative to administrative penalties as set out in Option #2 (paragraph 5.30 - 5.31)? In what cases or for what offences would it be appropriate?
40. Do you agree with Option #3 (paragraph 5.32) of RJ having a role within the criminal justice system when dealing with regulatory non-compliance? Please elaborate on your views.

- a. Could it be used at the pre-sentence stage?
  - b. Could judges include an RJ element as part of a sentence?
41. In what cases or what types of offences would the use of RJ as part of a criminal proceeding be appropriate?
  42. Should regulators undertake pilots to explore the potential of Restorative Justice to improve outcomes for victims, offenders, and communities in business regulation?
  43. Who should contribute to the cost of the RJ process?
  44. What safeguards are necessary in the RJ process?
  45. Does Restorative Justice have a role to play in remedying regulatory breaches where no identifiable individual victim(s) exists such as in cases of environmental damage?
  46. RJ is a voluntary process, so should it ever be suggested by a judge or a regulator as an alternative to a more formal sanction?
  47. Will corporate or business offenders be under pressure to accept an offer to enter into an RJ process because it is seen as a lesser or softer alternative?
  48. What should happen if a company does not adhere to the agreed upon outcomes of an RJ process?

### **Alternative Sentencing in Criminal Courts**

49. Are financial penalties or imprisonment adequate sanctions for addressing regulatory non-compliance in a criminal setting?
50. Why do judges not use other legislative provisions for alternative sentences such as compensation orders?
51. Should judges be afforded a broader range of sentencing options to deal with companies and individuals who have not met their regulatory obligations?
52. Are financial penalties alone sufficient to deter companies from not complying with regulatory obligations?
53. Should regulators and government departments look to amend their legislative provisions to extend the sanctioning options available to judges?
54. Would the following potential extended sanctioning options be appropriate for sentencing in cases of regulatory non-compliance?
  - a. Publicity orders
  - b. Corporate rehabilitation orders
  - c. Corporate probation orders
  - d. Mandatory audits
  - e. Community service orders
  - f. Remediation orders

55. Which offences would be appropriate for alternative sanctions?
  56. Which firms would be considered appropriate for alternative sanctions?
  57. Do you have any suggestions for other types of sanctions that should be considered, not mentioned on the above list?
  58. Should judges seek to remove all of the financial benefit obtained as a result of regulatory non-compliance in their sentencing through a profits order plus a fine?
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**BOARD TIMELINE OF PREVIOUS CONSIDERATION**

February 2005: *INT 05/02/01 – Food Standards Agency’s Formal Response to the Consultation on the Interim Report on Reducing Administrative Burdens: Effective Inspection and Enforcement*

**<http://www.food.gov.uk/multimedia/pdfs/int050201.pdf>**